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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re Andre H., Minor.

D043952

San Diego County Health & Human
Service Agency,

(San Diego County
Super. Ct. No. J514584)

Petitioner and Respondent,

v.

Dawn S.,

Objector and Appellant.

APPEAL from a judgment of the Superior Court of San Diego County, Julia Kelety, Judge. Reversed and remanded with instructions.

Dawn S. (Mother) appeals the judgment terminating her parental rights over Andre H. She contends the court erred by not applying the sibling relationship exception to

termination of parental rights (Welf. & Inst. Code, § 366.26, subd. (c)(1)(E))¹ and by prematurely finding that the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) did not apply.

BACKGROUND

Dependency proceedings for Andre, who was then six years old, were commenced in August 2002. The petition alleged: Mother abused alcohol and crystal methamphetamine; had a 15-year history of drug use; had been incarcerated in 1996 for possessing crystal methamphetamine for sale; was incarcerated following a July 2002 arrest for possessing drug paraphernalia, selling a hypodermic needle, grand theft, and elder abuse (of Andre's maternal grandmother);² and Andre's father (Father) was deceased. Andre was detained in Polinsky Children's Center, then detained and placed in a foster home. The section 366.26 hearing took place in January and February 2004.

SIBLING RELATIONSHIP

Section 366.26, subdivision (c)(1) allows termination of parental rights after a finding of adoptability by clear and convincing evidence. An exception exists if "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared

¹ Statutory references are to the Welfare and Institutions Code unless otherwise specified.

² Mother subsequently pleaded guilty to caretaker theft from an elder and grand theft and was sentenced to prison.

significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(E).)

The juvenile court is "to balance the benefit of the child's relationship with his or her siblings against the benefit to the child of gaining a permanent home by adoption in the same manner the court balances the benefit of the child's continued relationship with the parent against the benefit to the child of gaining a permanent home by adoption when considering the section 366.26, subdivision (c)(1)(A) exception. The court must balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and belonging adoption and a new home would confer." (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 951, citing *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "To show a substantial interference with a sibling relationship the parent must show the existence of a significant sibling relationship, the severance of which would be detrimental to the child." (*In re L. Y. L.*, *supra*, 101 Cal.App.4th at p. 952.)

Here, the court noted that sibling relationships were "extremely important" and found there was "a very positive relationship" between Andre and his siblings, from which Andre derived "a sense of security and stability." It noted that Andre would "have concerns about security and stability his whole life," the only alternative to adoption was a "situation that is far less secure and stable for him," and the foster mother had said that she "would 'do all in [her] power' to let [Andre] see his siblings." The court concluded

that the benefits of adoption outweighed the detriment from the loss of the sibling relationship. It said it would "ask that the adoption orders . . . include . . . sibling contact." It stated that it understood the limitations of that request, but hoped the relationship would be maintained. Examining the evidence most favorably to the judgment, we conclude substantial evidence supports the determination Mother did not meet her burden of showing the sibling relationship exception applied. (*In re L. Y. L.*, *supra*, 101 Cal.App.4th at pp. 947, 951; *In re Megan S.* (2002) 104 Cal.App.4th 247, 250-251.)

Andre has two half-siblings, Nadia D., who is nearly seven years older than Andre, and Adrian D., who is nearly four and one-half years older than Andre. Nadia and Adrian D. had been in the custody of their father, Sergio D., since 1994, before Andre's birth. The three children saw each other more than once a week. From the time Andre was two years old, Nadia and Adrian stayed overnight with him at Mother's house, and from the time Andre was four or five years old, he stayed overnight at Sergio's home with Nadia and Adrian at least three times a month. At one time, Andre spent three weeks in Sergio's home. The children also stayed together overnight at the home of a family friend, Anita G., about once a month, until Andre was detained. According to Anita, the children were together about three times a week. Child welfare referral logs for September 1996 and April 2001 also suggest that all three children were present in one home.

When Andre was first detained in foster care, he said he wished that his brother and sister could stay in the foster home with him. When asked to draw his family, he

included Nadia and Adrian in the picture. In a report dated March 2003, the social worker stated that Andre's foster mother had attempted to arrange sibling visits, but Nadia and Adrian had been too busy to visit, and visits were being arranged for two days a month. The social worker testified that the foster mother "seemed more than ready" and "more than happy" to facilitate visitation. Beginning in September 2002, sibling visits took place about once a month. The siblings also had telephone contact with Andre.

The social worker testified that Andre said he enjoyed seeing his siblings. She noted that during a visit she observed, he appeared happy but played with his Game Boy the entire time. Andre's foster mother and therapist stated that although he appeared to enjoy the visits, he had difficulty regulating his emotional reaction, with his episodes of enuresis and encopresis occurring most frequently after these visits. Andre's therapist, who began seeing him in September 2002, testified that although he had initially spoken of Nadia and Adrian, he had not said much about them in a long time. Andre's foster mother, who wished to adopt him, believed that it was important for him to stay in contact with Nadia and Adrian and testified that she "would do all in [her] power" to continue contact after the adoption as long as Andre continued to want it.³ The foster

³ Mother argues that the foster mother "would not guarantee" continued sibling contact. Actually, the foster mother testified that she "plan[ned] to continue" sibling contact; Mother's counsel next asked whether she would "make a personal guarantee" and the court sustained the Agency's relevance objection.

mother and Andre put together a album of photos of people in his life, including Nadia and Adrian.

Andre said he enjoyed the visits with his siblings. He testified he felt "good" about his half-siblings, liked them, and liked visiting and hugging them. He did "not really" want to see them more or less. He did not know how he would feel if he never saw them again. His foster mother told him that he would see them less if she adopted him, and he felt "good" about that. He did not want to see Nadia and Adrian very much because it engendered bad feelings and memories; one time when he lived with Mother, Nadia and Adrian yelled at him because he came to visit them. He did not talk about Nadia and Adrian at his foster home because he did not want to bring up bad memories and he was afraid it would hurt his foster mother's feelings if he told her he liked them.

Nadia testified that she and Andre shared a strong bond that could not be broken. Whenever they saw each other, he hugged her, she twirled him around and tickled him, and he laughed. She had been invited to spend the night at the foster home but did not feel safe, although she had been to the foster home "a lot, . . . maybe seven times." On Christmas Day Andre's foster mother brought him to Nadia's home for a visit. According to Nadia, Andre's foster mother ended each visit when they "start[ed] bonding."

Mother testified that Andre and Nadia were very close and that they had "spent entire summers at [Mother's] house." Andre, Nadia, and Adrian "spent a lot of time together" and they took five or six family vacations lasting "days, weekends and weeks." Mother believed it would be detrimental for Andre to be separated from Nadia and Adrian.

Even if severance of Andre's relationship with his siblings would cause him detriment, substantial evidence supports the conclusion that the benefit of adoption outweighs the benefit of continuing the sibling relationship. If parental rights remain terminated, Andre gains a permanent home through adoption. He told his therapist that he wanted to stay in his foster home and be adopted by his foster parents. He said he felt "[s]afe and good" when his foster mother told him she wanted to adopt him, and described his bedroom in her home as his "safe place." He testified that he had mixed feelings about adoption but felt safe in his foster home and wanted to continue living there until he was 18. The therapist testified that Andre had come to trust his foster mother. The psychologist who evaluated Andre recommended that he have a stable and consistent environment, a recommendation with which the therapist agreed, even if there was a strong sibling bond. The therapist noted that Andre needed to feel safe and longed for a family and a sense of security. She believed that Andre's stability and sense of security were "of u[t]most importance" and agreed with the social worker's and the psychologist's recommendations that he be freed for adoption. The therapist believed it was "possible" that a cessation of contact between Andre and his siblings would harm Andre, but she could not "say for sure."

Mother argues the court found that "if sibling contact did not continue, adoption would be detrimental." Although the juvenile court expressed the hope that contact would continue and cited the foster mother's statement that she would encourage contact, it recognized that continued contact was not guaranteed and did not rely solely on the foster mother's statement. Mother also asserts that a permanent plan of guardianship

could have included an enforceable order for future contact. However, guardianship would not guarantee future contact because it would not bind Nadia and Adrian and their parents, Sergio and Mother. (See *In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1019.)

The juvenile court did not err by declining to apply the section 366.26, subdivision (c)(1)(E) exception to termination of parental rights.

ICWA

The August 2002 detention report stated that ICWA did not apply. Mother said that Father died about seven months after Andre was born and there had been no paternity test. In her paternity questionnaire, she answered "yes" to the question whether Father had any American Indian heritage, but did not name a tribe or band. At the detention hearing, Mother's counsel said "[i]t looks like [ICWA] does not apply." When the court asked if Mother had any Indian heritage, her attorney said there were "[n]o registered memberships." When the court asked if the same question about Father, Mother's attorney said, "I think perhaps a slight bit, but I don't think they're registered." Father's brother, a possible source of information, attended a May 2003 hearing.

Mother contends the court erred by prematurely finding, at the detention hearing, that ICWA did not apply, and by not ordering the social worker to investigate and give the appropriate notice. Respondent concedes the notice requirements of ICWA were not satisfied in this case.

"[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by

registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) "If the identity or location of the . . . tribe cannot be determined, such notice must be given to" the Bureau of Indian Affairs (BIA). (*Ibid.*; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247.) "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).)

"Since the failure to give proper notice of a dependency proceeding to a tribe with which the dependent child may be affiliated forecloses participation by the tribe, notice requirements are strictly construed." (*In re Karla C.* (2003) 113 Cal.App.4th 166, 174, quoting *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.) The notice requirement applies even if the Indian status of the child is uncertain. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422.) The showing required to trigger the statutory notice provisions is minimal; it is less than the showing needed to establish that a child is an Indian child within the meaning of ICWA. (*Dwayne P. v. Superior Court, supra*, 103 Cal.App.4th at p. 258.) A hint may suffice for this minimal showing. (*Ibid.*) "The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.) "If . . . the court has reason to know the child may be an Indian child, the court shall proceed as if the child is an Indian child" (Cal. Rules of

Court, rule 1439(e).)⁴ "If at any time after the filing of the petition the court knows or has reason to know that the child is or may be an Indian child, the . . . notice procedures must be followed." (Rule 1439(f).) The juvenile court and the Agency "have an affirmative duty to inquire whether the child for whom a [dependency] petition . . . has been . . . filed is or may be an Indian child." (Rule 1439(d).)

DISPOSITION

The judgment terminating parental rights is reversed. This matter is remanded to the juvenile court with directions that it (1) require the Agency to give proper ICWA notice to any appropriate tribe and the BIA, and file with the court the notices, return receipts, and any responses, and (2) hold a new section 366.26 hearing. If, at the new section 366.26 hearing, the court determines the ICWA notice was proper and no Indian entity seeks to intervene or otherwise indicates Andre is an Indian child as defined by ICWA, the court shall reinstate all of its previous findings and orders, including the termination of parental rights. If, on the other hand, an Indian entity determines Andre is an Indian child under ICWA, the court shall conduct the detention, disposition and all subsequent hearings in accordance with ICWA.

McDONALD, J.

WE CONCUR: McCONNELL, P. J.

HALLER, J.

⁴ Rule references are to the California Rules of Court.